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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-381

BUSINESSMEN AFFECTED SEVERELY BY YEARLY ACTION PLANS, INC. (BASYAP, INC.), *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI

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Under Supreme Court Rule 58(2) Petitioners request a rehearing on the denial of their Petition for Certiorari on November 13, 1972.

The grounds for this petition are:

1. After the filing of the Petition for Certiorari on September 5, 1972, the President's Counsel on Environment of Quality (CEQ) and the Department of Interior strongly urged further study of petitioners' alternative plan to the urban renewal plan herein.

2. In view of the November 13, 1972 date of this Court's order denying the Petition for Certiorari, Petitioners respectfully suggests that the Court did not have the opportunity to evaluate Petitioners' timely-filed Reply to the Respondents' Opposition, said Reply setting forth the merits of Petitioners' alternative plan.

I. RECOGNITION BY OTHER GOVERNMENT AGENCIES OF THE MERITS OF PETITIONERS ALTERNATIVE PLAN CORROBORATES PETITIONERS' CONTENTION THAT RESPONDENT SECRETARY OF HUD ABUSED HIS DISCRETION IN FAILING TO AFFORD PETITIONERS A DUE PROCESS OPPORTUNITY TO DEMONSTRATE THAT THE ALTERNATIVE PLAN MEETS THE OBJECTIVES OF THE URBAN RENEWAL PLAN HEREIN

Petitioners filed a civil action in the U.S. District Court for the District of Columbia in January 1972 challenging the urban renewal project herein[1] for failure to comply with Section 102 of the National Environmental Policy Act of 1969.[2]

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[1] *BASYAP v. DCRLA, et al.*, Dt. Ct. D.C., No. 99-72.

[2] 42 USC 4332(2).

Petitioners won an initial preliminary injunction pending the filing of the statutorily-required environment impact statement by Respondent Secretary of HUD. Respondent Secretary ultimately filed an impact statement and served a copy on counsel[3] herein on September 25, 1972, three weeks after the Petition for Certiorari was filed. Included as exhibits to said impact statement, were letters from the President's Council on Environmental Quality (CEQ) and the U.S. Department of Interior, which strongly suggest that Respondent Secretary never considered Petitioner's alternative plan.[4]

CEQ's letter (Appendix A-1, hereto) strongly critized Respondents' failure to adequately consider the Arthur Colton Moore Plan and noted the unconvincing analysis of the project herein.

The Department of Interior's letter (Appendix A-2, hereto) points out numerous inadequacies of HUD's consideration of Petitioners alternative plan and the numerous faults of the present project itself, and ends with a caustic rebuke of HUD for it's failure to consider the social impacts on the area and the fate of the 130 businesses in the project area.[5]

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[3] Also counsel for BASYAP, *supra* 1.

[4] The Court will recall the Petition for Certiorari contended Petitioners were not afforded an opportunity to rebut the present project and to present the merits of their alternative plan, the Arthur Colton Moore plan, dealing with an air-rights concept of rehabitating the present structures and building other structures above them.

[5] The Court will recall the Petition for Certiorari calling attention to the likelihood of the destruction of the small-business community in the project area.

Just reported in the Washington Post on December 5, 1972, (see Appendix A-4), the U.S. General Accounting Office strongly criticized Respondent HUD for it's failure to prepare adequate environmental impact statements before financing projects significantly affecting the environment.[6]

The CEQ and Interiors letters are clearly supportive of Petitioners' earlier contention that Respondent HUD never considered the Arthur Cotton Moore Plan and never afforded Petitioners a constitutionally adequate due process opportunity to challenge the project herein and to present reasonable alternatives.

Petitioners realize the foregoing government letters are not evidences bearing directly on the merits of the Petition for Certiorari. However, insofar as they reflect on the unconstitutional actions of the Respondents herein in denying Petitioners a constitutionally adequate due process opportunity to rebut the government's facts before the government takes their property and destroys their businesses and livelihoods[7] – the letters are significant to the extent that this Court should not blind itself to the irreparable injury the government is unconstitutionally foisting on Petitioners.

This Court cannot in good conscience refuse to recognize the merits of Petitioners' contention raised in the Petition for Certiorari because of political, personal or other reasons. This Court must recognize the social havoc which will result from failure to grant certiorari, to wit,

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[6] The District Court in *BASYAP v. DCRLA et al.*, D.C.D.C. 99-72 found that the project will significantly affect the environment.

[7] *Greene v. McElroy*, 360 US 474, 476 (1959).

the destruction and death knell of small businesses throughout the country – the very foundation of this country. Respondent HUD, and local agencies funded with federal money, will consider this Court's refusal to grant certiorari as a license to declare purely commercial areas – comprised mainly of small-businesses – as blighted and deteriorated under the guise of an urban renewal area without giving the small-businessmen the opportunity to challenge the factual basis of the declaration, and as a further license to transfer these areas over to a select few developers for intensive commercial development. Permitting this to occur, without resolving the constitutional propriety of the process, will turn the clock back 20 years in Washington and across the land to the darkest days of arbitrary administrative oppression.

II. THE COURT APPEARS NOT TO HAVE HAD THE OPPORTUNITY TO CONSIDER PETITIONERS' TIMELY-FILED REPLY BEFORE DENIAL OF CERTIORARI

Petitioners filed and served by hand their Petition for Certiorari on September 5, 1972. Respondents' Opposition was mailed to counsel and received on October 26, 1972. Petitioners filed a timely Reply to the Opposition on Thursday, November 9, 1972. Since this Court's letter of denial was dated November 13, 1972,[8] a Monday, the ordinary logistics of assembling the members of the Court for decisions, subsequent paper work, and ultimate typing would suggest that the decision to deny certiorari was not made on November 13, 1972 but on a day in the previous week, leading to the further logical conclusion

[8] Counsel was advised of such denial by a telephone call from a newspaper wire service approximately 10:00 a.m. on November 13, 1972.

that this Court made it's decision on the day of filing or some previous day to the filing of Petitioners' Reply and that the Court did not consider the Reply.

The Reply was relevant to the Court's decision as it provided pertinent rebuttal to the government's brief and conclusionary 2 page argument of their Opposition devoted to the merits of the Petition for Certiorari. The Reply also amplified the Arthur Colton Moore Plan, which was ever so cursorily treated in footnote 3 of the Opposition and corrected Respondents misstatement of *Berman v. Parker*, 348 U.S. 26.

Before making the decision on the merits of the Petition for Certiorari – the denial of which will likely adversely affect small businesses throughout the country – the Court should have had the benefit of Petitioner's Reply and considered it along with the Petition.

WHEREFORE, Petitioner prays that the Petition for rehearing be granted.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that this Petition is restricted to the grounds initially set forth.

NICHOLAS A ADDAMS, ESQ.
1707 "N" Street, N.W.
Washington, D. C. 20036
785-1250
ATTORNEY FOR PETITIONERS

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
Council On Environmental Quality
722 Jackson Place, N. W.
Washington, D. C. 20006

July 11, 1972

Dear Mr. Jackson:

The Council staff has reviewed the draft environmental impact statement submitted by your Department on the proposed Downtown Urban Renewal Area in Washington, D.C. In our judgment, the analysis leading to the proposed action, when compared to alternatives available, is not convincing. In particular, further attention should be given to the so-called "air rights development" proposal designed by architect Arthur Cotton Moore and supported by a number of other groups and individuals.

In this regard, Council staff have met in recent weeks with HUD officials on an informal basis to outline our suggestions. We understand that further investigations of alternative actions are now underway. We endorse this undertaking and urge you to use whatever means you consider appropriate to elicit additional information for use in the preparation of the final statement.

Sincerely,

/s/ Timothy Atkeson
Timothy Atkeson
General Counsel

Mr. Samuel C. Jackson
Assistant Secretary for Community
Planning and Management
Department of Housing and Urban Development
Washington, D. C. 20410

cc: Mr. James Miller, HUD
Mr. Robert Duckworth, HUD Area Office

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

August 7, 1972

Mr. Samuel C. Jackson
Assistant Secretary for Community
Planning and Development
Department of Housing and Urban
Development
Washington, D. C. 20410

Dear Mr. Jackson:

This is in response to your letter of May 1972 requesting our comments on the Department of Housing and Urban Development's draft environmental impact statement, dated May 8, 1972, for the District of Columbia Neighborhood Development Program Plan Modification via Disposition Controls to the Downtown Urban Renewal Area.

The proposed action implements a small portion of the Downtown Urban Renewal Area and is interrelated with development of the subway system. Accordingly, it is sometimes difficult for the reviewer of the draft statement to distinguish clearly the environmental impacts of the project from those of the more comprehensive Downtown Urban Renewal Project and of the subway system now under construction. Contributing to this confusion are the graphics in the draft statement which frequently portray the Downtown Urban Renewal Area without any indication of the proposed project site locations. Also, the graphics have a low degree of legibility.

The subject draft environmental statement makes no reference to historic or archeological resources. Section 106 of the National Historic Preservation Act of 1966 (80 Stat. 915) requires that the head of any Federal agency having direct or indirect jurisdiction over a federally assisted undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking, take

into account its effects of any district, site, building, structure, or object that is included in the National Register of Historic Places. Accordingly, the draft statement should show evidence of reference to the National Register and consultation with the State Liaison Officer for Historic Preservation concerning properties in the project area which may be under consideration for nomination to the National Register. The Deputy Mayor serves as the State Liaison Officer for Historic Preservation in the District of Columbia. Also, we suggest that the draft environmental statement indicate what steps would be taken to mitigate any adverse effects upon archeological resources should such resources be encountered during project development.

We believe that the social impacts of the proposed action merit further consideration and analysis. Little attention is given to the effect of the proposed project on the 50 households, the 130 business establishments, and the 1,000 or so persons now employed by these establishments which would be displaced by the proposed project.

Because the objectives of the proposed actions have economic overtones, we are surprised at the paucity of hard data concerning probable economic effects. We believe that the draft environmental statement should contain an analysis of the primary and secondary economic impacts of the proposed projects on the community.

We hope these comments will be useful to you in preparation of the final environmental statement.

Sincerely yours,

(sgd) W. W. Lyons
Secretary of the Interior

Deputy Assistant

A14 Tuesday, Dec. 5, 1972 THE WASHINGTON POST

GAO Scores Environment Impact Data

United Press International

The General Accounting Office (GAO) criticized six federal agencies yesterday for preparing inadequate environmental impact statements before financing projects significantly affecting the environment.

Rep. John D. Dingell (D-Mich.) said the environment is degraded and the public is shortchanged by the failure of the agencies to comply with the precepts of the 1969 Environmental Policy Act.

The agencies criticized by the GAO, Congress' auditing agency, were the Soil Conservation Service, Corps of Engineers, Reclamation Bureau, Federal Highway Administration, Forest Service and Department of Housing and Urban Development.

"They resist efforts to disclose fully all adverse environmental effects of their projects," Dingell said. "They are fearful that if they do so, the public would insist that many projects be substantially altered or abandoned."